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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner Department of
Human Resources State of Georgia,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

REPLY BRIEF FOR THE PETITIONERS

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SUMMARY OF ARGUENT

1. The cases of *Burdick v. Takushi*, 504 U.S 528 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991) have no application in this case to the First Amendment right to free speech or the Fourth Amendment right of the individual to be free from unreasonable search by the government. p. 4

2. The legitimate privacy expectations of a candidate are not diminished in similar fashion to the persons involved in drug testing in Von Raab, Skinner and Acton. p. 6

3. The intrusion on the legitimate privacy interest of the candidates is not diminished by the manner in **which** the urine specimen is collected or by the fact that a candidate must disclose financial information. p. 8

A. The mere possibility that a candidate may be involved in a criminal activity adds no substantive weight the government interest relative to the weight of the individual's Fourth Amendment rights. p. 11

B. The Respondents are incorrect in their argument that the privacy interest of a potential candidate is decreased substantially because they are seeking to be elected to public office. p. 12

4. Almost all elected politicians have the potential to do harm to the people in some way because of their elected position. But, because of all the safeguards of law enforcement with the ability to make warranted and suspicion based searches, the scrutiny given to candidates by the public and the media, and finally the protection of the Fourth Amendment, the weight of government's interest is much less than the weight of the individual's Fourth Amendment right. p. 14

ARGUMENT

1. The cases of *Burdick v. Takushi*, 504 U.S 528 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991) have no application in this case to the First Amendment right to free speech or the Fourth Amendment right of the individual to be free from unreasonable search by the government.

As set forth in *Burdick*:

> A court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. *Anderson v. Celebrezze*, 460 U.S. 780, 788-789. Under this standard, a regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters right to "*severe*" restrictions. *Norman v. Reed*, 502 U.S. ___,___."

***Burdick*,** 504 U.S 528 (1991). *Burdick* simply speaks to voters rights under the First and Fourteenth Amendment as to the setting of qualification for a candidate. *Burdick* does not lower the standard specifically for the individual's First and Fourth Amendment rights. The Court held specifically that Hawaii could place the

restriction to ballot access providing that no candidate is allowed to be a write in candidate. The Fourth Amendment was made applicable to the state in *Wolf v. Colorado* 338 U.S. 25 (1949). The Fourth Amendment rights of an individual were not made applicable to the state in any lesser degree than any other fundamental right. No case provides such. No case provides that a lesser standard is applied to state laws in respect to the First Amendment right of the individual to freedom of speech or the Fourth Amendment right to be free from unresonable search by the government.

The issue in ***Burdick, 504 U.S. 528,*** is whether the disallowance of write in voting is a violation of voters' First and Fourteenth Amendment rights to associate politically through the vote and to have their choice placed on the ballot and the case revolves around the manner in which votes are actually collected, specifically Hawaii's prohibition on write in voting. The Petitioner does not challenge the State of Georgia's right to prescribe the method in which the votes are gathered.

In *Gregory*, 501 U.S. 452, the Court held that a state could require judges to retire at age 70. *Gregory* held that " [t]he authority of a state's people to ***determine the qualifications*** of their most important government officials lies 'at the heart of representative government' and is reserved under the Tenth Amendment and guaranteed by the Guarantee Clause of Article IV. [Citations omitted]." Id. at 452. The Petitioners do not argue a state does not have the right to set the reasonable qualifications for office. One such qualification might well be that the candidates do not participate in any

illegal act such as the use of drugs, or the qualification could be a candidate can not be convicted felon. But the state has no right to violate the candidate's Fourth Amendment by making an unwarranted and suspicionless search unless a compelling interest is found as was found in *National Treasury Employees union v. Von Raab*, 489 U.S. 656, (1989) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) This *Gregory*, 501 U.S. 452 case is not substantively relevant to the issues present case before the Bar.

2. The legitimate privacy expectations of a candidate are not diminished in similar fashion to the persons involved in drug testing in *Von Raab, Skinner and Acton.*

The respondents contend that because the appellants/candidates knew they would be forced in submit in advance to the search, that inherent intrusiveness or degradation of the search is diminished, citing *Von Raab*, 489 U.S. 656. Respondent's Brief, p. 9. The *Von Raab* majority's specific statement is that "we do not believe that these [privacy] expectations outweigh the government's *compelling* interests in safety and in the integrity of our borders." Emphasis added, *Von Raab* 489 U.S., at 672. In *Von Raab*, note 2, *Id.*, the Court minimizes the intrusion of the test upon the privacy on the agents. In the Courts discussion of the balancing of the state's interests and the individual's rights, the Court is cognizant of the conditions of the entire job. As pointed out in the Petitioner's brief, p. 11, the Court in *Von Raab*, 489 U.S., at 669, noted that the persons being tested are persons on the "front line of the drug war" who carry firearms. Id. This testing is allowed in part

because of the physical nature and preciseness of execution of the job required of the agents. According to this Court, these men are essentially required to meet the conditions of a soldier at war. The compelling interests involved are stated by the Court as follows:

> [T]hose who join our military or intelligence services may be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquires into their physical fitness for those special positions. [Citations omitted.]
>
> We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their *fitness*. [Emphasis added]

Von Raab, 489 U.S., at 672. While the Court prefaced its statement that the privacy expectations of the drug agents did not outweigh the Government's compelling interests based on the fact of the immediate requirements

of the agent's work involving fitness and probity, the conditions of the work of candidates in the present case are unlike the drug agents situation. The candidates are not directly dealing daily with the issue of drugs in a situation that involves firearms where physical dexterity is important, impacting life-and-death split second decisions that have to be made. Typically decisions are made in a slower more deliberate fashion and most or all of a candidate's work will not involve drug interaction. Decisions are typically made in conjunction with other people. Because of the nature of the of the a political candidates work, there is no immediate great danger and there is no requirement of physical fitness in the nature of a soldier. From a common sense point of view and, also, simply a direct examination of the facts, a candidate can not and should not expect a search of his bodily fluids simply because he is a candidate for political office. An elected official's job does not involve the physical fitness of an individual. The candidates are not involved in a heavily regulated industry, that is so regulated partly because of great potential danger to life and property.

3. **The intrusion on the legitimate privacy interest of the candidates is not diminished by the manner in which the urine specimen is collected or by the fact that a candidate must disclose financial information.**

The urine testing procedures provided by O.C.G.A. § 21-2-140, 53 Fed. Reg. 11979 (1988), are a substantial invasion of privacy of an individual involved in an excretory function. " There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk

about it at all." *Skinner*, 489 U.S. at 617 The urine collection procedure required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979 (29988) § 2.2 (f) are substantively invasive of an individual's personal dignity. A candidate must: remove all unnecessary outer garments; wash and dry his or her hands; prior to providing the specimen, "remain in the presence of the collection site person and . . . not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other material which could be used to adulterate the specimen"; and provide the specimen in a stall or otherwise partitioned area. Prior to urination, the person collecting the specimen must observe the prospective candidate and note any unusual behavior or appearance. *Id.* The person collecting the specimen also must remain in the room during urination, outside the stall or partition. Within four minutes after urination, the temperature of the specimen is gauged. *Id.* Finally, if tampering is suspected, then a second specimen must be provided under direct observation. Id. These procedures do not "insure that the drug testing requirement constitutes a reasonable intrusion upon the potential candidate's Fourth Amendment right to be free from unreasonable search and seizure." Respondent's brief, p. 10.

The respondent's brief, pp. 18-23, and the amicus brief of the United States, pp. 20-23, argue that the individual candidate's privacy interest is diminished by the fact of the requirements of financial disclosure. This Court has recognized the high level of privacy intrusion

involved in drug testing. *Skinner*, 489 U.S., at 626. Drug testing requiring excretion of the bodily fluids is far different than simply disclosing financial records. The requirement of an individual performing an excretory function is a much more private and personal process than the simple revelation of the money in one's bank account or ownership of certain investments. The Court has not recognized such financial disclosure requirements are on the same level as a drug testing procedure that require an individual to perform an excretory function. The point is argued that the candidate's privacy expectations are lowered by the background checks as the Court held in *Von Raab*, 489 U.S., at 671. However, the issue once again is the privacy interest of an individual being balanced against the state's interest in needing to perform such a private and personal search. The state's need is more than adequately served by current law enforcement and the scrutiny of a candidate given by the media. No special need of the state exists given the media's *0pen-hunting-season* approach to candidates involved in our elections. Normal law enforcement methods and this election process are sufficient to prevent drug users from attaining office. The people of the United States adopted the Fourth Amendment to prevent personal and private searches based on the mere possibilities of criminal activity or the facile arguments of demagogues and tyrants. No special need is shown in the present case that is not served by the election process, law enforcement with searches conditioned on probable cause and warrants, public association with the candidate, and media scrutiny.

A. The mere possibility that a candidate may be involved in a criminal activity adds no substantive weight the government interest relative to the weight of the individual's Fourth Amendment rights.

Criminals may be sometimes elected or candidates may become criminals after elected, but law enforcement and our election process are the true protectors of the public's trust. The Washington Legal Foundation's Amicus brief, p. 22, cites several instances of where politicians have been implicated in some form of drug dealings. These stories are evidence that law enforcement and the close examination of politicians by the public is sufficient to safeguard our government. Politicians have been caught and convicted of many different crimes just as many other people have. The fact that politicians exist who commit or have committed crimes does not give the government the right to abridge everyone's Fourth Amendment rights under the tests enunciated by the Court in *Von Raab*, 489 U.S. 652, *Skinner*, 489 U.S. 602, or *Acton*, 115 S.Ct. 2386, unless a compelling, special need is found that outweighs the people's Fourth Amendment right. The simple possibility of the occurrence of an event taking place is generally no basis for abridging the Fourth Amendment rights of a candidate unless there is the threat of great and/or immediate danger. Actual dangers or concerns are required to be shown, similar to those in *Skinner*, *Von Raab* and *Action*. The Fourth Amendment offers little protection to the individual from the government. if simply the possibility of a danger need be shown thereby allowing a warrantless suspicionless search.

B. The Respondents are incorrect in their argument that the privacy interest of a potential candidate is decreased substantially because they are seeking to be elected to public office.

The respondents cite several cases that indicate that malice is required to prove libel by a publication as to an untrue statement about a candidate. *See Monitor Patriot* Co. diseases, 401 U.S. 265, 271 (1970); *Ocalla Star-Banner Co. v. Damron*, 401 U.S. 298 (1970), *New York Times v. Sullivan*, 376 U.S. 254 (1964). These cases simply indicate malice is required before a newspaper can be held liable for publishing a libelous statement about an individual. In *New York Times v. Sullivan*, 376 U.S. 254, the Court is upholding the First Amendment right of free speech. The fact that the potential candidates entire life can be the focus of discussion, with the publisher of information having the heightened protection of *New York Times v. Sullivan*, 376 U.S. 254, requiring malice as to the publication of libelous information, does not lessen the right of the individual be free from an unreasonable search by the government. This heightened protection of a publisher under the First Amendment is one more reason why the mechanisms for determining whether a candidate is a law violator are sufficient without the need for the candidates Fourth Amendment rights being abridged.

The candidates subject to the test would not be, if elected, continuously and intimately involved with drug traffickers and probably not at all. They are not children in the custodial care of the state, where the state is in "loco parentis". *Acton*, 115 S.Ct., at 2391. The job of the legislature does not involve a situation where a

physical or mental error could result in great and life threatening immediate danger to people. The situation is not one where a great and immediate threat to life exist. *Skinner*, 489 U.S. 602

Respondents cite *Malcolm v. Webb*, 211 Ga. 449 (1955), Respondent's brief, p. 12, in support of their argument to show that the interest of the state in drug testing is an important, compelling interest. This respondents argue that because *Malcolm*, 211 Ga., at 456, holds that a public officer must use his or her best "judgment and skill", the state's interest is compelling. Respondent's brief, p. 12. The respondents appear to be attempting to make some analogy to the *Von Raab*, 489 U.S., at 672, requirement that agents should reasonably expect such inquiry into fitness and probity. Again, the analogy is inappropriate. The job of the drug agents directly involved continuous exposure to drugs. The job of drug agents are involved in the job of interacting with drugs and with persons involved with the trafficking of drugs on a large scale basis. The agents are involved with life-and-death situations and the success of the drug interdiction effort. Physical fitness is an important part of the job upon which lives may depend. These are the reasons justifying the Fourth Amendment intrusion. None of these factors are substantially present in the offices of Governor, Lieutenant Governor, Commissioner of Agriculture, or legislator. If these factors are present, they are subject to the checks and balances of the system and the democratic process of examination.

In arguing a person must use his best "judgment and skill" and, therefore, must be tested for drug abuse, opens the door to just about any other testing. Based upon this reasoning, candidates could be tested for alcoholism, genetic defects, ethics, intelligence, diseases, mental illness or any thing that society considered abnormal so that we may be sure that a person elected to office is not distracted due to some problem in his or her life and that these problems will not get in the way of his or her best "judgment and skill" in office. This argument is extreme, but the Respondent's argument is difficult to interpret otherwise.

4. Almost all elected politicians have the potential to do harm to the people in some way because of their elected position. But, because of all the safeguards of law enforcement with the ability to make warranted and suspicion based searches, the scrutiny given to candidates by the public and the media, and finally the protection of the Fourth Amendment, the weight of government's interest is much less than the weight of the individual's Fourth Amendment right.

The respondents argue that the danger lies in a possibility that an illegal drug user might involved with the arrests, convictions and enactment of legislation. The hypothetical involvement of the Governor, Lieutenant Governor, Commissioner of agriculture, and legislators with drugs does not involve continuous involvement of drugs as was present in *Von Raab*. Also, Politicians are always subject to the scrutiny of the public. While it is true that some elected officials must be involved with arrests, convictions and enactment of legislation, that fact is true as to all crimes and other important matters.

This involvement does not provide justification for the repeal the Fourth Amendment for all political candidates. According to the Respondent's argument, if a person is involved in anyway with activity dealing with crime, that person is therefore "susceptible to influence by those" who participate in such crimes. The reasoning appears to be: because these candidates might be involved with governmental action toward crime, the individual candidate is therefore susceptible to undue influence by those who commit crime, and, therefore, must sacrifice their Fourth Amendment rights. This reasoning opens the door for the justification of the political candidate, as well as anyone else in a position to do any damage to life or property, having his or her Fourth Amendment rights abridged.

The respondent argues that a state elected official, as a result of using drugs, will be subject to bribery and blackmail which will result in their assistance with the distribution and use of drugs. This is a concern as to any type of crime. What if a politician is or has been involved with organized crime, murder, adultery, robbery, embezzlement, smuggling, or any other crime? The elected official could be involved in enacting crime laws, enforcing laws and prosecuting those who violate the law. All politicians are then in positions to be corrupted. This potential involvement does not mandate that all elected officials should have their Fourth Amendment rights abridged.

The United States amicus brief in support of the Respondent complains that the Petitioners point out that the necessary interest of government to justify a

warrantless or suspicionless search must be compelling. The Court provides in *Acton*, 115 S.Ct. 2386, that "the most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government responsibilities, under a public school system, as guardian and tutor of the children entrusted to its care." *Acton* 115 S.Ct., at 2396. Also the Court found that, "indeed, we could not possibly find clearly erroneous – the district Court's conclusion that 'a large segment of the student body, particularly those in interscholastic athletics, was in a state of rebellion,' that '[d]isciplinary actions had reached 'epidemic proportions,' ' and that 'the rebellion was fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture.' 796 F.Supp., at 1357. That is an immediate crisis of greater proportions than existed in *Skinner*, ..." Id., at 2395. The interest was immediate and compelling considering the concern was for children, who were wards of the state. Id. The concern raised here is not an immediate and compelling interest and does not involve children who are wards of the state. Further, the Court in *Acton*, 115 S.Ct. 2386, 2394-2396, did not in anyway overrule the holdings in *Von Raab*, 489 U.S., at 670, or *Skinner*, 489 U.S., at 628, where the Court did require a compelling interest to be shown.

CONCLUSION

The Court should hold unconstitutional O.C.G.A. § 21-2- 140reversing the Eleventh Circuit Court of Appeals.

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